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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 98

SUSIE V. WATWOOD, *Petitioner,*

v.

STONE'S MERCANTILE AGENCY, INC., a Corporation, *Respondent.*

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

SUMMARY

QUESTIONS PRESENTED

1. Is this case within the class of cases which is important to the public as distinguished from that of the parties or does it present a question of general importance so that a writ of certiorari should issue?

No constitutional question was either urged below or decided.

2. Where a mercantile agency sends a commercial report in good faith to a subscriber who is under contract with it,

does it not come within the privilege allowed by the law of libel?

3. Where a report is induced by the petitioner's attorney and obtained from the respondent through the medium of an associate or friend who is under a contract with the respondent, is it not subject to the rule pertaining to a self induced libel?

4. Was there a publication of the libel within the meaning of the law?

5. Was the preparation of the report by the employee of the respondent whose duty with the respondent was to prepare reports and the copying of it by the typist employed by the respondent a publication?

6. Is it a libel to say that a married woman, who had lived with her husband for seven months in a well known public hotel and who in the public court record had sued her husband for breach of promise of marriage, had a child attending school, even if she had no child but a nephew who lived with her and attended school?

JURISDICTION

This is a libel suit.

It does not appear to be within the character of cases in which this Court customarily grants a writ of certiorari, Rule 38, paragraph 5 of this Court.

No constitutional question was either urged below or decided.

In *Layne & Bowler Corporation* v. *Western Well Works*, 261 U. S. 387, 393; 67 L. ed. 712, 714, Mr. Chief Justice Taft speaking for the Court said:

> "• • • it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and em-

barrassing conflict of opinion and authority between the Circuit Courts of Appeal".

The writ of certiorari was dismissed.

The above excerpt was quoted verbatim recently by Mr. Justice Frankfurter in his dissenting opinion in *United States* v. *Shannon*, decided January 14, 1952 (No. 47, October Term, 1951), Advance Sheets Lawyers Co-operative Edition 96:226.

See also:

State of Maryland v. *Baltimore Radio Show*, 338 U. S. 912, 94 L. ed. 562.

COUNTER STATEMENT OF CASE

By reason of the third question said to be involved by the petition for certiorari (page 1 of petition), the facts as undisputed by the depositions and admissions on file are reviewed as concisely as the record permits. They differ materially from the petitioner's statement of them in the petition for certiorari (page 5 of petition).

No constitutional question was presented to either of the Courts below nor did the decision grant to mercantile agencies the power of "economic destruction" or anything of that color as set forth in the petition for certiorari (page 1 of petition).

The statement (pages 2 and 3 of petition) that any of the trial judges considered "evidence not of record" is gratuitous and manifestly without foundation.

The facts as shown by the record, as the respondent sees them, are quite different from those set forth in the petition for writ of certiorari.

Many pages of discovery testimony were taken by both sides and the pleadings, depositions and admissions on file show that there is no genuine issue of fact as to material allegations; they are undisputed in the record. Whatever the petitioner may say by way of argument or abuse cannot change the evidence.

A short review of these facts seems advisable here.

The mercantile report was instigated by counsel for the plaintiff-petitioner (Maurice A. Guervitz) and it was through him, in a circuitous course, and another lawyer (Dennis Collins), who was a friend of his, that the report was requested and furnished (R. 70, 76 and 66). Collins was associated with Neil Burkinshaw (R. 67 and 65). Burkinshaw neither read nor saw the report (R. 66). Collins did not recall ever reading the report (R. 73). The employees of defendant-respondent, who were called for discovery testimony by the plaintiff-petitioner after the ruling by Judge Kirkland (the second trial Judge to hear the case), did not remember the report until attention was called to it after the action was filed (R. 82, 84, 86), and had not read it (R. 83). The reporter who prepared it (Mazza) preparee approximately six thousand reports a year (R. 83). The typist (Miss Hollars) types "forty or fifty a day" (R. 86), which mathematically approximates fifteen thousand a year. Mr. Stone, president of defendant-respondent corporation, knew of the report only from the record (R. 53). Mr. Guervitz did not show the report to anyone other than the plaintiff-petitioner (R. 78), even to his secretary (R. 78). Mr. Guervitz's secretary, Mrs. Berg, did not read, see or know anything about the report (R. 81).

Petitioner employed (R. 48 and 75) Mr. Maurice A. Guervitz, a member of the local bar (R. 74). Guervitz, at one time, had had a contract (R. 78) with respondent by which he agreed to treat in strict confidence all information received and not disclose such information to others, including the person on whom the report was made. Guervitz had had a disagreement with respondent (R. 75) and so did not order the report himself. Guervitz went to his friend Mr. Dennis Collins (R. 76), another member of the bar, with whom he had had a long association (R. 74). Mr. Collins was associated in the practice of law with Mr. Neil Burkinshaw (R. 67). Mr. Burkinshaw had a contract (R. 62) with respondent by which he agreed to treat in

strict confidence all information received, that reports were for his exclusive use in dealing with his clients and not to be transmitted to others, or be given to the one on whom the report was made. Collins, acting under the Burkinshaw contract, ordered the report from respondent (R. 70) and, when it came, gave it to Guervitz (R. 71 and 76). Burkinshaw did not read, see, or know anything about the report until respondent's counsel called on him to find what the facts were (R. 66). Collins had no memory (R. 73) of the report except that he ordered the report for, and at the request of (R. 72) Guervitz, for his (Guervitz) purpose and gave it to Guervitz (R. 77); Guervitz paid Collins for the report (R. 77); Collins in the name of Burkinshaw paid respondent. Petitioner received the report from Guervitz, who was then her attorney (R. 48 and 78).

Petitioner contends there was publication of the report addressed to Burkinshaw. If there was publication of the report, publication was made by and for the petitioner herself and the report was known only to the petitioner and her counsel.

It was a self induced publication.

The petitioner received the report from her attorney, who obtained the report through circuitous sources. The petitioner and her counsel are the only persons who read or remembered the report. This could not be publication.

ARGUMENT

Fundamentally the petitioner seems to argue that allegations proved by the depositions and admissions on file to be untrue give her a right to have a rehearing on those facts. Such a construction would destroy the effect of Rule 56 (FRCivP 56) and return the law to a demurrer to a pleading. The very purpose of the Depositions and Discovery Rules (FRCivP 26) and Rule 56 was to test the case not by pleadings alone, but by depositions and admissions on file.

I. There Was No Publication

There was no publication of the alleged libel.

The facts have been concisely reviewed above (counter statement of case, supra pp. 3-5).

The respondent mercantile agency sent a commercial report in good faith to a subscriber, who was under contract with respondent (R. 62).

These facts are established in the discovery depositions in the record.

Petitioner testified she employed Guervitz as her attorney, received the report from Guervitz, and at that time he was her attorney (R. 48).

Maurice A. Guervitz testified that he had been a member of the bar since 1940; was associated with Alfred Bennett and Leo Schlosberg; he had a secretary, Kathryn Berg; he knows Neil Burkinshaw; he also knows Dennis Collins, went to school with Mr. Collins in 1937 and 1938, and had handled one or two cases with him, but was not associated with him (R. 74); he was not then a subscriber to the services of Stone's Mercantile Agency, he had been a subscriber but had a disagreement, and he identified his contract (R. 75 and 78, Exhibit A). Guervitz also testified he represented the petitioner professionally late in 1948 or early 1949, until the summer of 1949 or later (R. 75); he obtained the credit report on the petitioner issued by the respondent from Dennis Collins, he asked Collins for the report and subsequently Collins gave it to him (R. 76); he paid Collins for it (R. 77); the only reason for ordering the report was as attorney for the petitioner (R. 77). He and his associates had separate offices and he did not know if his associates had contracts with the respondent (R. 77). He was pretty sure his secretary Mrs. Berg did not see the report and that he must not have shown the report to anyone other than the petitioner (R. 78). He thought he, or his secretary, drew up a complaint in the rough for petitioner in a case against respondent (R. 78).

Dennis Collins testified that he had been a member of the bar since 1940, was associated with Neil Burkinshaw and engaged in the practice of law (R. 67); he did not recognize the petitioner, then present, as anyone he had ever been acquainted with, did not think he had ever seen her before, and she was not a client or in any way connected in a professional way with his office (R. 67-68); in connection with his association with Mr. Burkinshaw, he had occasion to order mercantile reports from respondent (R. 68); he ordered a credit report from respondent on the petitioner at the request of Guervitz; Guervitz asked him to order a credit report for him on Susie Watwood (R. 70); he presumed he gave the report to Guervitz (R. 71); the report was not for any purpose in connection with his office and was only ordered for the purpose of delivering to Guervitz, at his request and for his purpose (R. 72). He did not recall reading the report and had no memory of it (R. 73).

Neil Burkinshaw testified that he has been engaged in the practice of law in Washington for thirty years (R. 63); he did not know the petitioner, she was not a client of his, and she did not ever confer or consult with him professionally (R. 64); he had been a subscriber to mercantile reports furnished by respondent and identified his contract (R. 64, 62, Exhibit B). Dennis Collins was associated with him and Collins has ordered reports for him (R. 65). Guervitz was not connected with his office (R. 65). He (Burkinshaw) did not secure a credit report from the respondent under the name of the petitioner, did not read such a report and never saw the report; did not know of its existence, did not know it was being ordered and knew nothing at all about it (R. 66).

The Burkinshaw contract (R. 62) contains a provision that reports are furnished for his exclusive information in dealing with his clients, as an assistance in passing upon some form of credits; that the respondent shall not be held liable for the accuracy of the contents of its reports; that

the subscriber shall treat in strict confidence all information received, protecting from disclosure the identity of the respondent, and in no circumstances allowing a person to become apprised of information furnished on him; that words Subscriber and Agent shall be interpreted to include representatives authorized to handle information communicated under the contract.

Kathryn Berg testified she handled secretarial work for Mr. Guervitz and she knows the petitioner in connection with office matters (R. 80); she had nothing to do with the credit report, did not read it, did not see it and does not know anything at all about it (R. 81).

William R. Stone, president of the respondent corporation, was called by the petitioner for discovery testimony and described the nature of credit reporting business and the service rendered (R. 53, 59-60); during the years 1948 and 1949, the respondent furnished a report on the petitioner to Burkinshaw and the Real Estate Commission and to no one else (R. 54); information to subscribers to the effect that petitioner "had a child" was given only in the report to Burkinshaw and the report to the Real Estate Commission did not contain such information (R. 56-57); the first time such information was reported was December 29, 1948 and such report has not been issued since (R. 57).

No testimony was offered by petitioner to the contrary although if the opposite were true the witnesses were available.

An excerpt from the opinion of the Court of Appeals (R. 89) will show the basis of that Court's decision.

> "But the usual rule, which we think should prevail in the District of Columbia, is that a mercantile agency's credit report to an interested subscriber is qualifiedly privileged; unless it is made in bad faith or for an improper purpose, the fact that it contains erroneous unfavorable statements about the plaintiff does not make the agency liable. The harm that such statements occasionally do to applicants for credit is believed to be small in relation to the benefits that sub-

scribers derive from frank reports. Since marital status and number of dependents bea r on credit, the qualified privilege is broad enough to cover the state- ments in respondent's report."

Although many pages of testimony were taken and peti- tioner had ample opportunity to question a ll of the officers, agents and employees of the corporation, there is not one word in this record to show any bad fai th or improper motive or anything to change the statemer t of facts given above. The respondent furnished the repc rt in good faith to its customer and the story ends there, except for the abuse made by the petitioner in her briefs and arguments in the trial Court and now in this Court up on the respond- ent and its counsel.

The Court of Appeals cites the followin g cases in sup- port of its decision.

Locke v. *Bradstreet Co.*, 22 F. 771 (C. C., D. Minn.)
Trussell v. *Scarlett*, 18 Fed. 214 (C. C., D. Md.)
Hooper-Holmes Bureau v. *Bunn*, 161 F. 2d. 102 (C. A. 5)
Colby Haberdashers v. *Bradstreet Co.*, 267 Mass. 166, 166 N. E. 550
Pollasky v. *Minchener*, 81 Mich. 280, 45 N. W. 5.

(a) Publication was caused by petitioner

It was surely not a publication of a libel, when the plain- tiff-petitioner obtained a report on herself for the obvious purpose of filing suit. Whatever damage was done to the petitioner was of her own making and, it is respectfully submitted, she cannot recover damages for what she causes herself.

"To constitute a publication it is ne cessary that the defamatory matter be communicated t some one other than the person defamed. The law of defamation pri- marily protects only the interest in rep utation. There- fore, unless the defamatory matter is communicated to a third person there has been no los s of reputation, since reputation is the estimation in which one's char-

acter is held by his neighbors or associates. The communication of disparaging matter only to the person to whom it refers is not actionable defamation, irrespective of the vile or scandalous character of the communication and its effects upon the feelings of such person. * * * "

Quoted from Restatement of the Law, Torts, Sec. 577.

It was a self induced publication.

The facts have been reviewed above and it seems unnecessary to repeat them.

The petitioner and her counsel are the only persons who read or remembered the report.

(b) No publication to respondent's employees

The petitioner contends there was publication because the report was seen by employees of the respondent.

After Judge Kirkland granted summary judgment as to the first amended complaint, petitioner filed a second amended complaint in which she alleged additional publication by virtue of the report having passed through the office of the respondent and its employees.

The second amended complaint (R. 2) alleged: "This report after having been read by a Mr. Mazza, Miss or Mrs. Hollars, Mr. Fletcher and William H. Stone, defendant's president, was then on or about the aforesaid date, transmitted to Neil Burkinshaw ***".

The individuals named above are all employees of the respondent (R. 82, 85, 84 and 52). It was apparently an afterthought on the part of the petitioner to bring in the allegation as to the employees. No allegation of publication to them was made either in the original complaint or in the first amended complaint.

After filing the second amended complaint, petitioner took the testimony of Mazza (R. 82), who prepared the report; Miss Hollars (R. 85), the typist; Fletcher (R. 84) and Ford (R. 83), other employees. Their testimony shows

that there could have been no publication, as far as they were concerned, that was harmful to the petitioner.

Mazza testified (R. 82-83) that he has been employed by Stone's Mercantile Agency since April of 1946; he is a credit reporter, collecting and compiling credit information by various methods: from employers, recognized merchants in town and casual informants; he probably made an investigation of the petitioner, about December 29, 1948 but had no recollection of it; he did not recall preparing the report; he has written during the period of his employment over six thousand reports a year.

Miss Hollars testified (R. 85-86) that she is a typist with Stone's Mercantile Agency and types reports issued; she was not familiar with the file of the petitioner in this case; she did not recall typing a report on December 29, 1948 covering the petitioner; after examination of the report shown her by petitioner, Miss Hollars testified she typed it from a written memorandum; there was no discussion in the office regarding the report; she typed "thousands" of reports—"forty or fifty a day"—and had no recollection of the report other than the fact that her typing initials are shown.

Fletcher testified (R. 84) that he had been employed by Stone's Mercantile Agency since July 10, 1919; he had read the report in question since the suit was filed, not before.

Ford testified (R. 83-84) that he had been employed by Stone's Mercantile Agency since September 8, 1926; he was not familiar with the file on the plaintiff, had never had occasion to read the file, and, had personally never seen the report before the day of his deposition.

Petitioner also took the testimony of Mr. Stone (R. 52) president of Stone's Mercantile Agency. His testimony has been summarized above (p. 8 supra). Mr. Stone testified that the first time the respondent reported the petitioner had a child was December 29, 1948 and such report had not been issued to anyone since (R. 57). Thus the undisputed evidence in the record is to the contrary of that stated in the petition for certiorari (page 5) "handled and seen by

Gordon H. Fletcher and William R. Stone, file clerks and record clerks".

In *Globe Furniture Co.* v. *Wright*, 49 App. D. C. 315, 265 Fed. 873, (cited by the Court of Appeals in the case at bar, R. 89) the Court said (p. 318):

> "Some courts hold that communications such as the one we are considering are not actionable, because the stenographer or other employee, to whom the communication was made before it was mailed to the person for whom it was intended, is not a third person, within the technical meaning of such term, but is merely an impersonal facility used in making and transmitting the communication. *Owen* v. *J. S. Ogilvie Publishing Co.*, 32 App. Div. 465, 53 N. Y. Supp. 1033; *Central of Ga., R. Co.* v. *Jones*, 18 Ga. App. 414, 89 S. E. 429. But we prefer to put our decision upon the ground that the occasion was conditionally privileged, that the letter was within the privilege, that there was no malice, and therefore that the letter is not actionable".

With respect to communication to respondent's employees, the situation in the case now before the Court, although not identical, is closely analogous to the employees' procedure in *Globe Furniture Co.* v. *Wright*, *supra*. The Court there said (p. 316):

> "There was testimony *** that the letter was written partly by the bookkeeper and partly by the general Manager, and, before being mailed, was shown to the bookkeeper and the collector. ***
>
> "**** The letter was written in the usual course of business. Each one of those who read it had a duty to perform for his employer in connection with it. By reading the letter he learned only what the three had talked about before the letter was drafted. *** Under these circumstances, was the occasion privileged, and if so, did the letter come within the privilege? We think the answer must be in the affirmative."

In the case now before the Court, the reporter (Mazza) and typist (Miss Hollars) were the only employees who had

any connection with the report. No other employee read or saw the report until after the suit was filed. The report was prepared in the usual course of business. The reporter and typist each had a duty to perform for the employer in connection with it. They were not third persons to whom the report was communicated. They were the persons preparing the report for the corporation. In the *Globe Furniture* case, *supra,* the letter was sent by the defendant to the plaintiff. In the case now before the Court, the report was obtained for the plaintiff, by plaintiff's attorney, through circuitous sources, and read only by plaintiff and her attorney.

The Court of Appeals in the *Globe Furniture* case, *supra,* expressly declined to follow the opinions in *Gambrill* v. *Schooley,* 93 Md. 48, 48 Atl. 730, cited by petitioner (petition for certiorari page 22), and *Pullman* v. *Hill,* 1 Q. B. 524, also cited by petitioner (petition for certiorari page 21).

The *Globe Furniture* case was decided by the Court of Appeals of the District on April 5, 1920 and has remained the law of this District ever since. Petitioner urges, in substance, that this case which over-ruled the cases now cited by the petitioner should itself be over-ruled. After being the law for 32 years, this would add chaos doubly compounded to the libel law of this District.

In *Biggs* v. *Atlantic Coast Line Railroad,* 66 Fed. (2d) 87 (C. C. A. 5, July 21, 1933), that Court said:

> "The declaration alleges that the letters were written in the course of the company's business. It is not alleged that they were published to anyone other than to the officers of the company to whom they were addressed. There is considerable conflict in the authorities, but we consider the better rule, supported by the weight of authority, is that where a letter is private, between officers of a corporation, in the course of the company's business, and is not communicated to others, there is no publication in respect of the corporation and it cannot be held in damages."

As there was no publication of the libel, whether the communications were privileged is immaterial.

> "* * * Unquestionably the defendant corporation, through its officer or employee who dictated the letter complained of, must have required the services of a stenographer; but the stenographer was not a third person to whom it may be claimed that a publication was made. The stenographer was a part of the defendant's organization, and required for the transaction of the defendant's business. The services of the stenographer were required to make complete the preparation of the article complained of. The dictation and transcribing of the alleged offensive matter were but parts of one act, as the result of which the letter was produced. It might as well be said that the agent of the defendant corporation who dictated the letter and who afterwards signed it was the third person to whom a publication was made, as to claim that the stenographer who wrote the letter was a third person to whom the defendant published the alleged offensive matter." *Wells* v. *Belstrat Hotel Corporation,* 212 App. Div. 366, 208 NYS 625.

The respondent corporation acts only through its officers and employees. The acts of its employees in performance of functions of employment are the acts of the corporation, not third persons. In this case, if the employees had not prepared and written the report, there would have been no report. Petitioner contends that respondent is responsible because its employees prepared the report. The participation of the employees in performing duties in the course of such employment is only the act of the corporation, not third persons. The employee is the facility, hand or member, of the corporate body that performs the function. The fact that the employees prepared, typed, or saw the report is not distinct from the action of the corporation itself, for which it is sued in this case. There was in fact but one act by the corporation and those engaged in the performance of it are not to be regarded as third parties but as common servants in the act. There was no publication by

reason of the participation of the employees in handling the report.

Owen v. *Ogilvie Publishing Co.*, 32 App. Div. 465, 53 N. Y. Supp. 1033 (Cited in *Globe Furniture Co.* v. *Wright, supra*)
Central of Georgia R. Co. v. *Jones*, 18 Ga. App. 414, 89 S. E. 429 (Cited in *Globe Furniture Co.* v. *Wright, supra*)
Dickson v. *Hathaway*, 122 La. 644, 48 So. 136

In *Ostrowe* v. *Lee*, 256 NY 36, 175 NE 505, cited by petitioner (page 22 of the petition), the stenographer was an employee of an individual, not the employee of a corporation. In the case at bar the employee was performing the corporate act for which suit is brought. It is respectfully submitted that the facts in this case are distinguishable from those in the *Ostrowe* case.

It is respectfully submitted that there was no publication, first, through Burkinshaw, because he never read or saw the report and he was respondent's contract subscriber; second, because, if there was publication, publication was made by and for the petitioner and known only to petitioner and her counsel; and, third, there was no publication to respondent's employees, as their actions were in connection with and part of their duties for the corporation, not as third parties.

It is therefore respectfully submitted that there was no publication of the alleged libel such as would give the petitioner any actionable cause and summary judgment was properly granted.

II. There Was No Damage

The petitioner was not harmed actually by anything stated in the report.

Burkinshaw did not read or see the report (R. 66). Collins had no memory of the report (R. 73). The employees of respondent, who prepared or typed the report, did not

recall the report and handled thousands of reports a year (R. 83 and 86). Other officers or employees of respondent saw the report only after suit was filed (R. 84), when their attention was called to it, naturally, for defense of the suit, or did not see it (R. 84). The only persons who read or remembered the report were the petitioner and her counsel, who had obtained the report. The petitioner had ample opportunity to show any other actual publication but none was shown and the testimony was that there was none (R. 57). The evidence before the Court has been referred to in other parts of this brief, supra, and it seems unnecessary to repeat the particulars.

. The petitioner could not have suffered any objective damage, i.e., in the estimation of others, and whatever subjective damage she suffered was brought down on herself.

III. The Alleged Libelous Statement Is Not a Libel of Petitioner

It is respectfully submitted that the alleged libel is not such. The petitioner alleges that she was libeled by a statement in a mercantile report (R. 6-8) that petitioner "is reported to have one child attending school ***" (R. 7). The petitioner combines separate statements in the report into a charge that she was libeled.

The respondent respectfully contends that the pleadings, depositions and admissions on file disclose that the petitioner is a married woman and that the alleged libelous statement is not a libel.

The first line of the original complaint states "the plaintiff comes in her maiden name" (R. 21). There is implicit in this statement, of course, that she either was or had been married.

The plaintiff-petitioner was called for discovery testimony (R. 42 to 52) and she testified, inter alia, that she was married to Jacob M. Cohen, on December 27, 1940 by Rabbi Metz, at the Shoreham Hotel in Washington, and

maintained a marital home in Washington with Mr. Cohen for approximately seven months (R. 43) and the marriage still exists and has never been dissolved in any way (R. 44); and, other than her maiden name, she used her married name (R. 43).

The petition for certiorari (page 5) says that the petitioner was married to Jacob Cohen, a fact which the trial court had before it by deposition and evidence.

The same statements, or what may be tantamount thereto, appear in a number of places in the record (R. 23, paragraph 5 prayers of complaint; 26, 38).

So that, when the cobwebs are brushed out of the case, the report said that a married woman had a child attending school.

To hold that it was libelous to say that a married woman had a child would impugn the integrity and morality of the mother of every living man.

It is difficult to understand how a lady, who testified that she had lived at the Shoreham Hotel for seven months with a man with whom she had gone through a ceremonial marriage, could have any complaint about one saying that she had a child. The very cohabitation, in a prominent City hotel, was a public acclaim that she was married and would, under the decisions of this Court, have constituted a valid common law marriage, even though there had been no ceremonial marriage. Everyone, who knew her, must have known that she openly held herself out as a married woman until she herself caused the confusion by suing her husband for breach of promise to marry.

But, says the petitioner, the report stated that she "claims to be single."

The suit was filed by petitioner "in her maiden name" (R. 21) and the proceedings in this cause are continued in her maiden name.

The mercantile report of which she complains is set forth in the record (R. 6 to 8, inclusive). It says "claims to be single" (R. 6).

In petitioner's deposition, she identifies herself as "Miss" (R. 42) and testified she normally used her maiden name in business introductions (R. 44) and a suit for breach of promise was filed in her name (R. 47) and she had employed an attorney to secure a divorce or annulment (R. 46).

The petitioner said substantially the same thing before Judge Holtzoff (R. 17).

Again, the petitioner complains that the report says that she "is reported to have one child attending school" (R. 7). If she lived with her husband in 1940 and the report was given in 1948, it is entirely possible for her to have a child attending school and, on the other hand, it could not be libelous to say that she is reported to have a child attending school if, as a matter of fact, she didn't.

She was asked about this matter rather extensively in the discovery testimony. She said that she had no child but that the marriage to Mr. Cohen had never been dissolved in any way (R. 44). She further testified that there was a nephew living with her and her mother in the same apartment who was attending school (R. 43-44). The nephew was the grandson of her mother (R. 44). Mother, daughter and grandson lived in the same apartment (R. 42-43).

Petitioner also testified that her husband had a child (R. 44).

With the premise that it is not libel to say a married woman had a child, the Court might consider for a moment how "the child" got into the report. It is very easy to see how respondent's reporter might have mistaken the grandson of petitioner's mother, who was living with the petitioner and her mother, or the child of petitioner's husband, as being hers and it wouldn't be a libel if he did.

The only report issued by respondent to the effect that petitioner "had a child" was the self-induced report sent to Burkinshaw (R. 56-57). This is uncontradicted by anything in the record.

No reference was made to an illegitimate child (R. 6-8, 16).

There is nothing else in the alleged libelous report which could be the basis of a libel suit.

The petitioner combines separate statements in the report into a charge that she was libeled (R. 3, 6-8). Petitioner is a married woman (R. 43). There was no statement in the report that the petitioner had an illegitimate child (R. 6-8, 16). There is nothing else in the alleged libelous report upon which recovery can be had (R. 6-8). The report was ordered at the request and for the purpose (R. 72) of petitioner's attorney (R. 76) and received by petitioner from him (R. 48 and 78). The report was not read (R. 66) or recalled (R. 73) by the intermediaries through whom it was obtained. The only report to the effect that petitioner "had a child" was the report sent to Burkinshaw (R. 57). The petitioner was not harmed by anything stated in the report, as it was not read (R. 66, 81) or recalled (R. 73, 83, 86) by anyone other than petitioner and her counsel. The second amended complaint alleged no publication within the period of the Statute of Limitations.

From the pleadings, depositions and admissions on file, summary judgment was proper.

IV. There Was No Malice

The petitioner claims that she alleged malice (petition page 15). Rule 56 (FRCivP 56) provides that the motion shall be decided on allegation, deposition and admission. One may allege anything, but to submit evidence of it is another matter. There is not one word of evidence or testimony in this record which would support any allegation of express malice. The request which she alleges, on page 15 of the petition, necessarily pertained to records as to suits against her. They could not have related to anything about the child. Only one report, according to

the undisputed testimony, said anything about a child, that to Burkinshaw (R. 57), which she obtained through her counsel (R. 48 and 78). Any complaint she allegedly made appertains to the report of the suits for which the law does not create a liability and not to the alleged child.

Cohen v. *Marx Jewelry Co.*, 67 App. DC 347, 349; 92 Fed. (2d) 498
Holtz v. *National Furniture Co.*, 61 App. DC 80-81; 57 Fed. (2d) 446
Stannard v. *Wilcox and Gibbs*, 118 Md. 151; 84 Atl. 335; 42 LRA (NS) 515.

The inferences that the petitioner seeks to draw from her allegation without proof are entirely impossible. Only one report that was issued said anything about a child (R. 57). The allegation that the petitioner made a request "to correct their records as to her financial status" (petition, p. 15) simply could not have pertained to that of which she now complains.

V. Consideration of Other Objections By Petitioner

Petitioner objects that certain pages of the transcript are noted by the reporter as rewritten. Nothing was said in the printed appendix of the transcript and original brief filed in the Court of Appeals about this matter and until the petition was filed for rehearing in the Court of Appeals, after the petitioner had discharged her self employed attorney. The petition for rehearing was filed in proper person. The respondent's answer to this argument is contained in its answer to the petition for rehearing (R. 113). The pages to which petitioner objects are pages 209 through 215, 221, 222 and 223 of the original transcript, reflected in page 48 and part of page 49 and parts of pages 51 and 52 of the printed record in this Court.

Nowhere in the record has petitioner stated what was the error in the pages that were rewritten.

Title 28, Section 753 Judicial Code provides:

> "The transcript in any case certified by the reporter shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the Court shall be considered as official except those made from the records taken by the reporter."

Respondent's case is in no way dependent upon these so called rewritten pages. No one of the page references contained herein are within the so called rewritten pages, which petitioner now challenges, except page 48 and the facts there stated are also contained in pages 75-78, which pages are not challenged. The respondent had nothing to do with the rewriting of the pages, to correct the misspelling of the name Guervitz or words, and if there was any error it was encumbent upon the petitioner to show what the record was originally and what the reporter should have rewritten. Nothing of the kind was done in the trial Court, in the Court of Appeals or in the record or brief.

Petitioner through counsel took the deposition of Mr. Stone, president of respondent (R. 52-63); petitioner also took the depositions of respondent's employees (R. 81-86). The respondent included in the printed record in the Court of Appeals (R. 21-86) the parts of the record which were in answer to the questions presented by petitioner's original brief.

The United States Attorney moved to quash subpoenae upon two of the trial judges, Judge Matthews and Judge Kirkland. Nothing is said in the printed record about this. The motion to quash subpoenae and affidavits of the Judges are shown in the original transcript, which is on file in this Court (Transcript pages 479, 481, 482, Record not printed).

Respondent filed a motion to dismiss (R. 23). After the motion was filed, the Court appointed an active member of the bar to represent the petitioner on an affidavit by her seeking that appointment (R. 26). The motion to dismiss

came on for hearing before Judge Matthews and was granted with leave to file an amended complaint (R. 27). Amended complaint was filed and respondent filed a motion for summary judgment, which came on for hearing before Judge Kirkland and was argued by Mr. Williams, the Court appointed attorney. Summary judgment for respondent was entered (R. 35). Mr. Williams withdrew his appearance (R. 36) before the second amended complaint was filed. After the second amended complaint was filed, the petitioner caused to be issued for Judge Matthews and for Judge Kirkland subpoenae requiring them to appear as witnesses for discovery testimony before a Notary Public. The United States Attorney moved to quash the subpoenae and filed affidavits of the Judges that the only information which they had concerning the case is information obtained in capacity as a judge while determining the motions. No showing was made by petitioner that either Judge had any knowledge of the case except what he or she obtained from the record and argument. It was an apparent attempt to subject the Judges to a cross examination of their reasons for judging against the petitioner when the record amply showed those reasons. Nothing was said about this matter in the Court of Appeals until the petitioner had asked the Court to strike out the appearance of her self employed attorney (which the Court did) and she filed a petition for rehearing in her own name which took on a different tenor from that made by the original brief and record. She now contends that the United States Attorney should not have been allowed to move to quash the subpoenae issued for the Judges.

See:

Yaselli v. *Goff*, 12 Fed. (2d) 396 (CCA2, 1926); affirmed 275 U.S. 503; 72 L. ed. 395
Bradley v. *Fisher*, 13 Wall. 335, 20 L. ed. 646
Alzua v. *Johnson*, 231 U.S. 106, 58 L. ed. 142.

These are the undisputed facts with respect to the fourth and fifth reasons given in the petition for certiorari (pages

2, 24-25 of petition). No contention was made on these points in the Court of Appeals until after the decision of the Court of Appeals.

It is respectfully submitted that the statement of the facts answers the argument by petitioner.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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